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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1246

T. RALPH GRIMES, Sheriff of Fulton County, Georgia
PETITIONER

vs.

TOM TAYLOR TOLG,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals for the Fifth Circuit.

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TOM TAYLOR TOLG,
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PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

T. Ralph Grimes, Sheriff of Fulton County, Georgia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 24, 1966.

OPINIONS BELOW

The opinion of the United States District Court denying Respondent's petition for writ of habeas corpus is reported in 229 F.Supp. 289 (N.P. Ga. 1964) and printed in Appendix A hereto, *infra*, p. 14. The opinion of the Court of Appeals reversing such judgment (Judge Bell dissenting) is reported in 355 F.2d 92 (5th Cir. 1966) and is printed in Appendix B hereto, *infra*, p. 36.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 24, 1966. This petition is timely brought [1] and jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Civil Rights Act of 1964 confer a blanket immunity from prosecution under criminal trespass laws upon persons seeking service in places of public accommodation, regardless of the nature of the trespass or activities engaged in by such persons.

2. If such blanket immunity is conferred by the Civil Rights Act of 1964, does the abatement principle announced by this Court in *Hamm v. Rock Hill*, 379 U. S. 306 (1964) render void even those convictions which had become final prior to the effective date of that Act, thus causing such convictions to be susceptible to collateral attack.

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[1] 28 U.S.C. § 2101(c); *Heflin v. United States*, 358 U.S. 415, 418 (1959); *United States v. Hayman*, 342 U.S. 205, 209 (1952).

STATUTES INVOLVED

Ga. Laws (1960) pp. 142-143 [Ga. Code Ann. § 26-3005].

"It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

78 Stat. 241.

"Sec. 201 (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.

(b) Each of the following establishments which serve the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by state action:

(1) ....

(2) Any restaurant . . ." [42 U.S.C. § 2000a].

"Sec. 203. No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." [42 U.S.C. § 2000 a-2].

STATEMENT

Respondent is a white civil rights worker who came to Atlanta from Ohio in June 1963 in connection with his employment with the "Student Non-Violent Cordinating Committee" to assist that organization in its efforts to eliminate the practice of segregation in privately owned restaurants. In Atlanta he participated in what amounted to a mob action on June 13, 1963 at the entrance to a restaurant whose owner appeared to have a policy of not serving Negroes [2] (this being approximately one year prior to enactment of the Civil Rights Act of 1964).[3] With his accomplices Respondent, by sitting and lying in the entrance with arms locked together, effectively blocked the entrance so that other persons could neither enter nor leave (R. 153-154). This was done during the peak business hours of the restaurant which were between 12:00 and 2:00 o'clock, and two or three hundred persons gathered in the street [R. 153]. After asking Respondent and his accomplices to leave his premises (they refused), the restaurant owner called the police. When they again refused to leave upon the restaurant owner's second request, Respondent and his accomplices were arrested [R. 153-154.]. Respondent and the group he was with had to be carried away bodily upon their arrest [R. 67-68]. As a result of the foregoing action Respondent was indicted by the Grand Jury of Fulton County, Georgia, for the offense of violating Georgia's criminal trespass statute, to wit: Georgia laws (1960) pp. 142-143 [4] [R. 137-138]. Tried before jury in the Superior Court of Fulton County, Respondent was found

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[2] See *United States ex rel Tolg v. Grimes, 229 F.Supp. 289, 291* (N. D. Ga. 1964).

[3] 78 Stat. 241.

[4] See Ga. Code Ann. § 26-3005.

guilty on August 30, 1963 [R. 138-139] and on the following day was fined and sentenced for a period of eighteen months, with provision, however, that after four months the balance of the sentence would be suspended if Respondent would state in writing his purpose and intention to obey the laws of Georgia and any other state in which he might reside [R. 139-140]. Respondent filed both a motion for new trial and a motion in arrest of judgment and was released upon bond. [R. 45-46, 118]. Both motions were overruled on March 13, 1963 [R. 141-143] and Respondent did not appeal the orders overruling the same to the Supreme Court of Georgia.[5]

After the thirty day period during which an appeal could timely have been taken had elapsed, the trial judge, on April 20, 1964, ordered the Respondent to be taken into custody to commence serving his sentence [R. 130]. Without making any attempt to pursue his appeal in the state courts (urging that the lack of notice excused Respondent from the thirty day rule) and without making any attempt to secure relief in the state courts through habeas corpus proceedings, Respondent, on April 22, 1964, filed application for the writ of habeas corpus in the United States District Court for the North-

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[5] The reason for Respondent's failure to appeal to the Supreme Court of Georgia by filing a timely bill of exceptions is uncertain. The secretary of the trial judge testified that she mailed copies of the orders overruling Respondent's motions to Respondent's counsel of record and that she had not had the same returned for "insufficient postage", "no such address", or any other reason [R. 24]. On the other hand Respondent's counsel testified that he had never received notice that orders had been entered overruling his motions [R. 90-91].

ern District of Georgia [R. 110].[6] Petitioner moved for dismissal on the grounds that Respondent had failed to exhaust his state court remedies (i.e., habeas corpus) [R. 128]. This motion was overruled by the District Court on the ground that:

> "The unusual circumstances of this case, including the present confinement of the petitioner by the respondent, constitutes such unusual circumstances as to authorize this court to entertain the writ." [7]

The matter was set down by the district judge for almost immediate trial [R. 158]. During the plenary trial in the district court Respondent freely admitted that with others he had wilfully blocked the entrance to the restaurant so that customers could not enter [R. 61], informing the court that he had a "constitutional right" to do so [R. 67].[8]

The United States District Court rejected Respondent's contention that Georgia's criminal trespass statute had been unconstitutionally applied against him and held that insofar as applied to arrest and prosecute "demonstrators" for unlawful overt acts which disrupted another's business, as was shown by the facts in this case, the statute had been validly applied [R. 170]. The peti-

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[6] Jurisdiction was invoked under 28 U.S.C. §2241(3), 28 U.S.C. §1343(3) and Section 1, Fourteenth Amendment, United States Constitution, Respondent contending that his conviction resulted from a discriminatory, illegal and unconstitutional application of Ga. Code Ann. § 26-3005, for the purpose of perpetuating and aiding racial discrimination in restaurants [R. 110-112].

[7] *United States ex rel Tolg v. Grimes*, 229 F.Supp. 289, 293 (N. D. Ga. 1964).

[8] *Ibid.*

tion for the writ of habeas corpus was denied on May 8, 1964 [R. 171], and Respondent filed his notice of appeal to the United States Court of Appeals for the Fifth Circuit on the same day [R. 172].

While the case was pending in the Court of Appeals for the Fifth Circuit two events occurred which were to significantly affect its outcome. The first was the enactment into law by the United States Congress of the Civil Rights Act of 1964, 78 Stat. 241. The second was the decision of this Court in the case of *Hamm v. Rock Hill*, 279 U. S. 306 (1964) which held that enactment of the Civil Rights Act prior to the time the judgments under attack were finalized caused an abatement of the state prosecutions for actions protected by the Act. [R. 199].

Basing its decision upon the Civil Rights Act of 1964, and particularly the language in Section 203 thereof which says: "No person shall . . . punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202" [R. 208], and also upon its interpretation of *Ham v. Rock Hill* as voiding all pre-act convictions for activities within the Act's protection so long as the sentence has not been fully served, *whether or not the case itself is still pending* [R. 208], the Court of Appeals (Judge Bell dissenting) [9] reversed the judgment of the District Court.

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[9] Judge Bell dissented on the ground that Respondent failed to exhaust available state court remedies as required by 28 U.S.C. § 2254, and that this requirement was not one which could be waived by the parties (Petitioner, desiring a decision on the merits had stated in his brief that he would not insist upon his own exception to the District Court's overruling of his motion to dismiss on this ground.) [R. 209-216].

As will be more fully shown in the argument portion of the brief, it is the position of Petitioner that the Court of Appeals misconstrued and misapplied both Section 203 of the Civil Rights Act and the decision of this court in *Hamm v. Rock Hill.*

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS HAS APPARENTLY INTERPRETED THE CIVIL RIGHTS ACT OF 1964 AS CONFERRING A BLANKET IMMUNITY FROM PROSECUTION UNDER CRIMINAL TRESPASS LAWS UPON PERSONS SEEKING SERVICE IN PLACES OF PUBLIC ACCOMMODATIONS, REGARDLESS OF THE NATURE OF THE TRESPASS OR ACTIVITIES ENGAGED IN BY SUCH PERSON.

Sec. 203 of the Civil Rights Act of 1964[10] provides that no person shall:

> "(c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

It is quite unthinkable, of course, that this provision of the Act would ever be interpreted as immunizing any and all conduct of persons seeking service in a place of public accommodation whose owner, however wrongfully under the Civil Rights Act, refuses them service. It could hardly be suggested, for example, that such a person, upon being refused service (albeit improperly so) could pull a pistol, shoot and kill the offending restaurant owner, and then escape prosecution by virtue of Section 203. Petitioner submits that the decision of the

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[10] 78 Stat. 241, 244 [42 U.S.C. § 2000a-2].

Court of Appeals in the instant case, while differing greatly in degree from the foregoing illustration, does not differ in kind. Both reflect a failure of critical analysis as to exactly what conduct is protected by Section 203 of the Act.

Nor does the answer to this question of what conduct is protected require considerable speculation. In *Hamm v. Rock Hill*, 379 U. S. 306, 311 (1964) this Court held that it was:

> ". . . *nonforcible* attempts to gain admittance to or remain in establishments covered by the Act . . ." (emphasis added)

which Section 203 immunizes from prosecution under criminal trespass, breach of the peace, and other criminal statutes. In *Hamm*, where the petitioner merely refused to leave the premises when asked, and where no interference with the rights of others to enter or even more importantly to depart was shown, it is of utmost significance that this Court did not say that *petitioners* could not be the subject of trespass prosecutions. What this Court did say was that because of the Civil Rights Act and under the facts there presented "petitioners *conduct* could not be the subject of trespass prosecutions." Petitioner believes that this distinction is vital not only in the instant case but also with respect to the general police power of states to preserve the peace and encourage the resolution of civil rights disputes either at the conference table or in the courts rather than in the streets.[11] Yet the Court of Appeals wholly failed to con-

[11] It has always been assumed that one of the purposes of the Civil Rights Act was to remove such conflicts from the street to the courtroom, and quite obviously the law enforcement problems presented by the expansive interpretation of Section 203 which the Court of Appeals has given (inconsistently we think with prior decisions of this Court) in the present case can scarcely be said to be of academic or episodic interest only.

sider this crucial aspect of the nature of the trespass and conduct of Respondent and his accomplices *which so clearly was the basis of District Court's decision.*[12]

The failure of the Court of Appeals to consider the same is not only inconsistent with the *Hamm* decision, but also conflicts with the same underlying principle as stressed in the pre-Civil Rights Act cases of *Peterson v. Greenville,* 373 U. S. 244, 247 (1963), where this Court expressly pointed out that the persons seeking service were clean, well dressed, and *"unoffensive in conduct"*, and *Lombard v. State of Louisiana,* 373 U. S. 267, 268 (1963) where the Court expressly noted that it was conceded that the petitioners had been orderly and *"did not cause any disturbance."* As shown by the findings of the United States District Court, the situation here was quite different. It is the position of Petitioner that the conduct of Respondent was reachable under the State's criminal trespass statute prior to the Civil Rights Act of 1964 (as the District Court held), that the conduct of Petitioner is not of the sort which that Act was designed to protect, and that conduct of this nature can today (and hopefully in the future) be reached by prosecution under appropriate criminal statutes, in-

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[12] After describing in some detail the willful action on the part of the Respondent and others to physically block the entrance to the restaurant, which in fact prevented other individuals from entering or leaving, the opinion declared:

"As applied to the arrest and prosecution of demonstrators for unlawful overt acts, disrupting a business, the statute would seem to be valid — and that is the question here presented.

"The gravity of the situation facing this nation should such tactics be given the approval of the courts . . . .

"Certainly there is a middle ground on which the law can tread without trampling underfoot the right of equal protection on the one hand and the right of protection on the other." See 229 F.Supp. *supra* at 298.

cluding criminal trespass statutes. However, meritorious their cause might otherwise have been, Respondent and his accomplices had no right to trespass upon the property of a privately owned restaurant and cordon off the entrance thereto, effectively preventing other persons from entering or departing. See *Cox v. Louisiana,* 377 U. S. 536, 555 (1965).

2. THE COURT OF APPEALS' APPLICATION OF THE ABATEMENT PRINCIPLE ANNOUNCED BY THIS COURT IN HAMM *v.* ROCK HILL [13] TO VOID A FINAL CONVICTION NOT ON DIRECT REVIEW REPRESENTS A RETROACTIVE INTRUSION INTO STATE CRIMINAL LAW WHICH IS WHOLLY UNWARRANTED BY THAT DECISION.

Assuming that this Court were to conclude that the Civil Rights Act of 1964 does confer blanket immunity from prosecution under criminal trespass laws upon persons seeking service in places of public accommodation, regardless of the nature of the trespass or the conduct of such persons, question still remains as to whether the abatement principle which a majority of this Court adopted in *Hamm v. Rock Hill,* 379 U.S. 306 (1964) is applicable to the present case. In *Hamm* this Court held that with respect to the *non-final* convictions which were before the court *on direct review,*[14] the Supremacy Clause of the Constitution required the abatement of state court prosecutions for conduct which although criminal at the time of its occurrence, had become a federally protected right by virtue of the Civil Rights Act. At least insofar as its relation to *non-final* convictions which are still on *direct review* is concerned, this appli-

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[13] 379 U.S. 306 (1964).

[14] Id. at p. 312.

cation is consistent with the common law concept of abatement as being applicable to terminate non-final convictions.[15] But here the Court of Appeals goes far beyond both common law and *Hamm*. It holds that abatement applies to void even those convictions *which are final*, provided only that the sentence has not been completely served. In the word of the majority of the Court of Appeals:

> ". . . any conviction which, if obtained in a state court following the Civil Rights Act would be invalidated by the federal statute, must be abrogated and voided completely, whether or not the *case* is still pending, if the *conviction* is still pending. This is still a "pending conviction" since the sentence resulting from it has not been served. We think the entire scope of the opinion in *Hamm v. Rock Hill* requires that this conviction be held to be void and of no effect."

With utmost deference to the Court of Appeals Petitioner submits that the foregoing represents a misreading of *Hamm v. Rock Hill* and constitutes a wholly unnecessary "retroactive intrusion into state criminal law".[16] Petitioner urges the Court that the abatement principle of *Hamm* ought not to be extended to situations where as here the conviction is final and arrives before the Court by virtue of collateral attack (i.e., habeas corpus).

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[15] See *Hamm v. Rock Hill*, 379 U.S. 306, 322-323 (1964). [Dissenting opinion of Mr. Justice Harlan].

[16] Id. at p. 315.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION AND JUDGMENT OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ALANTA DIVISION.

THE UNITED STATES OF AMERICA, Ex Rel	:	CIVIL ACTION NO. 8 8 9 5.
vs.	:	
T. RALPH GRIMES, Sheriff of Fulton County, Georgia.	:	PETITION FOR WRIT OF HABEAS CORPUS.

STATEMENT OF THE CASE.

This application for the writ of habeas corpus filed April 22, 1964 seeks to obtain the release of Tom Taylor Tolg now being held by respondent under authority of the sentence imposed upon petitioner for violation of Title 26 of the Georgia Code, § 3005 (Georgia Laws 1960, p. 142). The sentence was for a period of eighteen (18) months and One Thousand ($1,000.00) Dollars fine, with a provision that it would be suspended after four (4) months if petitioner herein would agree in writing to

desist in the future from a violation of the laws of Georgia and other states.[1]

Petitioner contends that the Georgia statute in question is unconstitutional. He further contends that said statute even if consitutional was used to protect and sanction racial discrimination in a certain restaurant in the City of Atlanta operated at the time by one Charles Lebedin, prosecutor in the State Court.

Plea in Abatement in the State Court.

Petitioner herein prior to his arraignment in the State Court filed a Plea in Abatement, setting up the aforesaid alleged application of the Georgia statute claiming defendant's rights to equal protection of the laws were violated in that the Police Department of the City of Atlanta allegedly arrested petitioner in a place of public accommodation, same constituting State action in violation of the Fourteenth Amendment to the United States Constitution.

This Court admitted in evidence by consent of all parties the transcript of the hearing of said Plea in Abatement in the State court with some doubt to the mind of

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[1] In the colloquy between the court and petitioner at the time of sentence (see plaintiff's exhibit 11) the trial judge stated:

> "The sentence of the Court is that you serve twelve months on the public works, six months in the common jail and pay a fine of a thousand dollars, provided however, that after you have served four months on the public works if you will state in writing that it is your purpose to comply with the laws of this State and other states wherein you reside, the remainder of the sentence will stand suspended conditioned upon your compliance with the laws of this State when you are in this State and the laws of other states, when you are in other states. So, after serving four months, if you are willing to present a statement to that effect, the remainder of the sentence would be suspended."

this Court as to its legal effect as to controverted issues of fact and as to the effect of the finding of the State court overruling the same.

After a careful study of said transcript, however, this Court is of the opinion that there was sufficient sworn testimony not in dispute upon which this Court can make its Findings.[2]

In situations such as this it would seem to be important to ascertain whether petitioner, together with two white companions and eleven Negro companions, did on June 17, 1963 peaceably enter "Leb's" restaurant, request to be served, were asked to leave and declined to leave, and were thereupon arrested under the Georgia statute, or whether on the other hand they committed other acts which would justify Mr. Lebedin's calling of the police for the protection of his property rights. While a discussion of the legal distinction between these points will be given hereinafter, the testimony herein referred to furnishes a basis for the application of the principles of law involved in this controversy.

Circumstances Surrounding Petitioner's Arrest.

Testimony adduced upon the hearing of the Plea in Abatement discloses the following circumstances surrounding the arrest of the petitioner:

Petitioner was a twenty-three years old white student of sociology, studying for his master's degree, in the

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[2] There was quite a bit of rather extravagant testimony adduced by each side, both as to the alleged conduct of petitioner and his thirteen companions, and also upon the part of Lebedin, the restaurant operator, and his employees. Counsel for neither side in this case offered to produce any witnesses to resolve these conflicts and the Court did not insist upon their production.

University of Miami in Ohio, also a teacher of sociology. He had come to Atlanta pursuant to his employment by "The Students Non-Violent Cooperation Committee" to assist that organization in its efforts to eliminate the private practice of racial segregation upon the part of privately owned public accommodations in Atlanta, with particular emphasis on restaurants.

On the morning of June 17th petitioner, together with two other young white students and eleven Negro students, met (by previous appointment, or otherwise) at a Negro church near Atlanta University (a Negro college) and together walked several miles to "Leb's" restaurant at the corner of Forsyth and Luckie Streets in the downtown business area. Some of this group had been there on previous occasions. There had been numerous occasions where this group, or similar groups, had picketed "Leb's" restaurant on account of its policy of segregation, causing a number of spectators to congregate about the same. On the day in question as this group approached the main entrance to the restaurant (this entrance consisting of a foyer of triangular shape at the intersection) Mr. Lebedin and some of his employees closed the door to prevent their entering and it is reasonable to suppose that his motives were partly on account of unwillingness to serve Negroes, and also his past experiences of disorder and unrest by virtue of the presence of such groups of demonstrators.

Charles Lebedin, sworn as an adverse party, testified in part as follows: On the day in question witness was inside his restaurant and he "saw a gang rushing the door, and we went up to stop them and they sat right down on my property," they tried to come in and we would not let them (Tr. 19). "There were some strangers

out there, customers that saw what was going on and they jumped right into it . . . the street was crowded with two or three hundred people" (Tr. 20) . . . "it was like a mob" (Tr. 21) . . . He had had these demonstrations for five months (Tr. 26). About ninety-five per cent of his customers entered through the door in question (Tr. 34). The demonstrators "were sitting on the sidewalk and laying there, naturally they were objectionable" (Tr. 42). . . "They were all in a bunch, they all had their arms locked together, they were sitting down and they all had their arms locked together" (Tr. 44). He asked them to leave but they refused. He called a policeman and the policeman before making arrests insisted that Mr. Lebedin again ask them to move, and they refused.

There seems to be no doubt that these demonstrators were blocking the entrance to "Leb's" restaurant so that customers could neither come in nor get out. They were sitting or lying in the vestibule just outside the door and were on the property of Mr. Lebedin (that is, the corporation in which he owns stock).

Petitioner Tolg was sitting in this vestibule and "the police had a hard time getting him up to put in the wagon" (Tr. 46). "Leb's" business reached a peak between 12:00 and 2:00 o'clock and that's the time the demonstrators were there. "They were obstructing the place, when you would try to get out and open our doors you couldn't" . . . people came in and joined strangers and there was really a rumpus going on, people could not get in and out of my restaurant at my peak period" (Tr. 52).

This demonstration apparently interfered seriously with other customers of "Leb's restaurant. Two lady

customers were in the restaurant, had to be back at their place of business by two o'clock, but were unable to leave. "Leb's" employees "tried to make a path . . . to try to get these women out" (Tr. 55). Certain strangers who were there tried to assist in this effort, they "stepped over these people . . . they formed a line and they said, now ladies come on out. I went outside and took the ladies out and walked them through." The ladies "were pleading, please get us out we have got to get to work" (Tr. 56).

The congestion at the door was further proven by testimony of Michael Sayer, a young Negro student who accompanied petitioner to "Leb's" restaurant who testified "I stood there unable to enter and unable to leave because there were people behind me also trying to enter the restaurant. Someone in the restaurant wanted to leave the restaurant so the left hand door . . . was opened . . . to allow this person to leave" (Tr. 75).

The above-named witness, Michael Sayer, was born in Brooklyn, New York, was a student in Atlanta University summer school in 1961 and graduated from Harvard University in 1962. At the time in question he was employed by the Students Non-Violent Cooperation Committee" with headquarters in Atlanta, he met with the others at Rush Memorial Church and the group walked three miles to "Leb's" restaurant, but denied they met there for the purpose of "coming up there and crashing "Leb's restaurant" (Tr. 94). He explained their sitting down before the door by stating "I sat down to protect myself after being shoved and pulled" (Tr. 96). He admitted, however, that he did sit down and the group that was with him also sat down (Tr. 97). He attempted to explain his failure to move by his alleged physical condition, with the following colloquy:

Q. "Answer my question. Was your physical condition such that you could not walk?"

A. "I am not a doctor and there is no categorial answer to the question. You are asking me to make a conclusion about my own condition. I think perhaps I might not have been able to" (Tr. 99).

Another demonstrator was Thomas Rachel, a Negro student at Morehouse College, eighteen years of age. He stated that when he arrived at the restaurant "one of the young men in a blue suit, he had blond hair, began to beat us" (Tr. 104), and he said "well, when the man came over and started beating us we sat down to protect ourselves" (Tr. 107).

While Mr. Lebedin would not expressly admit it, it appears clear from his testimony that it was his policy to exclude Negroes as customers of his restaurant. It was not shown that there was any statute of Georgia, or any ordinance of the City of Atlanta, or any custom or practice upon the part of either, as to such discrimination. While there were a number of charges of violence and brutality made by each group, for the most part they were not supported by the other testimony, particularly the testimony of one witness that someone struck one of the demonstrators with an iron pipe and that another, an old gentleman, hit one of them with a chain.

Additional facts in the record will be referred to in the discussion of law set out below.

(1) The State of Georgia has moved to dismiss this action upon the ground that petitioner has not exhausted a remedy accorded to him by the law of Georgia by

bringing a habeas corpus petition in the State courts. As authority for its position the State cites a case of *Porch v. Cagle*, 199 F.2d, 865 (5 Cir.) (1952) in which the writer granted the writ of habeas corpus and went into the merits of the matter involving a Negro convicted of murder in the State court. The Fifth Circuit Court of Appeals speaking through Judge Russell, dismissed the appeal, stating in part as follows:

> "The circumstances here present a case of failure of the appellant to exhaust State remedies before appealing to the Federal Court. The trial court should not have passed upon the merits of the petition, but should have dismissed the same."

The Court pointed out:

> "The right to the writ of habeas corpus is recognized by the Constitution of Georgia, and provisions implementing the constitutional guarantee are provided by the Georgia statutes."

The Court points out however, that the Federal Court may consider such applications for habeas corpus,

"where extraordinary circumstances exist," ruling, however, that they did not exist in the case cited.

A quite exhaustive discussion is given by the Supreme Court in the case of *Fay vs. Noia,* 372 U.S., 391, beginning at page 399. That involved a conviction in a State court, the defendant did not appeal. He applied to the State court for a writ of corum nobis to review his conviction, and it was denied because of his failure to appeal. He then applied to a Federal District Court for a writ

of habeas corpus, and the Supreme Court held that it should have been entertained.

Whether or not there exists a conflict between the two cases above cited, this Court will not now determine. This Court is ruling that the unusual circumstances of this case, including the present confinement of the petitioner by the respondent, constitutes such unusual circumstances as to authorize this Court to entertain the writ. Accordingly, this Court has set the matter down for almost immediate trial, a plenary trial has been had, and this Opinion and Judgment (as is quite apparent from a reading of the same) is being written and issued without a full opportunity to edit the same.

(2) Defense counsel also contends that this Court has no jurisdiction because allegedly no notice was given by the State court to this petitioner of two orders by the State court overruling respectively petitioner's motion for a new trial, and his motion in arrest of judgment. While considerable testimony was heard by this Court on that issue, this Court is of the opinion that no ruling is necessary to be made on that factual issue. No Georgia case has been cited to this Court to the effect that copies of said orders were required to be mailed to counsel for petitioner, or that notice should be given to them. There is a conflict in the testimony as to whether such notice was actually mailed. There is evidence tending to show copies of the orders were mailed and there is a denial upon the part of petitioner's attorneys that they were ever received. In *Fay vs. Noia,* 372 U. S. 391, the court ruled as follows:

"Respondent's failure to appeal was not a failure to exhaust the remedies available in the courts of the

> state as required by 28 U.S.C., § 2254. . . A Federal judge may, in his discretion, deny relief to an applicant for habeas corpus who has deliberately bypassed the orderly procedure of State courts, and in so doing has forfeited his State court remedies." (See headnotes 4 and 6(a)).

This Court in its discretion has seen fit to entertain this application, regardless of petitioner's failure, for any reason, to pursue his remedy of appeal in the courts of Georgia. By doing so, however, this Court is not setting a precedent for all future cases.

(3) The motion in arrest of judgment filed in the State court attacks the Act of the Georgia Legislature approved February 18, 1960 (§ 26-3005 of the Georgia Code) as being unconstitutional. The portion complained of reads as follows:

> "It shall be unlawful for any person who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

The grounds of attack are the following:

"Said portion of the mentioned Act is so vague, incomplete and indefinite as to be insufficient to place the defendant upon notice of the offense for which he was charged thereby preventing him from being able to

make a proper defense; nor does said statute set up any standard of conduct by which an owner must be guided in exercising any rights under said section; nor does said section enumerate any standard of conduct by which a defendant, as an ordinary layman and citizen could be guided in exercising his rights to remain on the premises without being arbitrarily or capriciously required to move or leave by the owner. Said section is therefore in derogation of Article I, Section 1, paragraph 3 of the Georgia Constitution, and Section 1 of the Fourteenth Amendment to the United States Constitution. The indictment as drawn therefore fails to charge an offense which is cognizable under the laws of Georgia."

This Court is ruling that the statute is not subject to any of the attacks made upon it and set forth above. See three cases decided by the Supreme Court of Georgia, April 9, 1964, to-wit; *Durham vs. The State,* Ga. p. ; *German vs. The State* Ga. p. and *Lloyd vs. The State,* Ga., p. ; *Clark vs. State,* 135 S.E.2nd, p. 270, Ga., p. (1964).

(4) The controlling question in this case is whether or not the trial judge should after a full hearing have sustained the Plea in Abatement filed in the State court when petitioner was there on trial charged with violation of the above statute.

In substance, the Plea in Abatement alleged that the above quoted Georgia statute was "being applied so as to deny this defendant due process of law and equal protection of law" under the Georgia Constitution and the Fourteenth Amendment to the United States Constitution. It alleged that the statute was being applied so as to "prepetuate a scheme of racial discrimination in place

of public accommodation within the City of Atlanta, which has long existed under State sanction through legislative enactments," etc.[3]

The Plea in Abatement further alleged that an Atlanta police officer arrested petitioner and others for failing to leave the restaurant of Lebco, Inc., a licensed place of public accommodation, although petitioner was willing to pay for the service requested, was appropriately dressed, and made the proper approach for such service. Significantly, the Plea in Abatement does not allege that petitioner was otherwise conducting himself in a lawful manner, nor does it negative the facts and circumstances existing at the time of his arrest, as heretofore recited.

Counsel for petitioner cite, as chief authority in support of petitioner's habeas corpus petition, the decision by the United States Supreme Court in the case of *Lombard, et al vs. Louisiana,* 373 U.S. 267. A minute study of that decision is required, not only for the purpose of noting what it does decide, but for the purpose of noting what it does not decide.

In the case just cited (involving trespass convictions resulted from an attempt by Negroes to be served in a privately owned restaurant) there was no state statute or city ordinance forbidding desegregation in restaurant facilities, and the court ruled that the case was governed by *Peterson vs. City of Greenville,* 373 U.S., 268.

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[3] No Georgia statute or decision has been cited to the Court, nor are there any such, regarding segregation in public accommodations such as restaurants in Georgia. That such segregation actually exists is a matter of common knowledge, but it is only partial, and not condoned by the City of Atlanta.

In the *Lombard* case it appeared that three Negro and one white college students entered a store, sat down at a refreshment counter and requested service, which was refused. The counter accommodated twenty-four persons. The group refused to leave, the counter was closed, the police were called, the demonstrators stated they "were going to sit there until they were gonna be served," they were arrested and taken off in a patrol wagon, tried and convicted under Louisiana's criminal mischief statute, somewhat similar to the Georgia statute above quoted. The Supreme Court of Louisiana affirmed their conviction and certiorari was granted by the United States Supreme Court.

It was pointed out:

> "Prior to this occurrence New Orleans city officials . . . had determined that such attempts to secure desegregated service, *though orderly and possibly inoffensive* to local merchants, would not be permitted." P. 269.

The Mayor of New Orleans issued a statement to the effect that he had "directed the Superintendent of Police that no additional sit-in demonstrations will be permitted regardless of the avowed purpose or intent of the participants." P. 271. The Court pointed out that the "evidence all tended to indicate that the store officials' actions were coerced by the city." P. 273.[4]

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[4] In passing, it may be said that the present and the prior administrations of the Government of Atlanta and the Police Department have in recent years attempted to show every consideration to the rights of the Negroes in this community. Mr. Lebedin has been quoted by the public press quite frequently, however, as charging that the Atlanta Police Department had failed and refused to give him police protection during the period of time involved in this case. The trial of this case entirely upon the transcript adduced in the State court trial prevents this Court from going into these features.

The Court stated:

> "Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance. The official command here was to direct continuance of segregated service in restaurants, and to prohibit any conduct directed toward its discontinuance; *it was not restricted solely to preserve the public peace in a non-discriminatory fashion in a situation where violence was present or imminent by reason of public demonstrations.*" (Italics supplied)

In no case prior to the *Lombard* case, and in no case cited therein, does this Court find a factual situation comparable to the one in the instant case. In the case of *Shelley, Et Ux v. Kraemer, Et Ux,* 334 U.S., p. 1 (1948) it was held that private agreements concerning segregation in covenants concerning real estate did not violate the Fourteenth Amendment, but that actions of the state courts constitute actions of the states, and may deny equal protection of the law. It was pointed out that no individual has the right to demand action by a state which results in the denial of equal protection of laws to other individuals. A similar ruling was made in *Barrows v. Jackson,* 346 U.S., 249, also involving a restrictive covenant as to real estate.

In the case of *Peterson, et al vs. City of Greenville,* 372 U.S., 244, a group of Negro boys and girls entered the S. H. Kress store in Greenville, seated themselves at the lunch counter, and had been sitting there for five minutes when they were arrested under an ordinance of the City making it unlawful for the operator of a restaurant "to furnish meals to white persons and colored per-

sons in the same room." It was pointed out "that the petitioners were clean, well-dressed, unoffensive in conduct, and that they sat quietly at the counter which was designed to accommodate fifty-nine persons." P. 247. After referring to the ordinance the court said:

> "The Kress management in deciding to exclude Negroes did precisely what the city law required."

The court pointed out that the convictions had the effect of enforcing such illegal ordinance, stating that

> "The state's criminal processes are employed in a way which enforces the discrimination mandated by that law." P. 248.

Justice Harlan, dissenting, referred to the right of the restaurant operator as follows:

> "Although the right of a private restauranteur to operate, if he pleases, on a segregated basis is ostensibly left untouched, the court in truth effectually deprives him of that right in any state where a law like this Greenville ordinance continues to exist. For a choice that can be enforced only by resort to self help has certainly become a greatly diluted right, if it has not indeed been totally destroyed." P. 252.

(5) This Court is of the opinion that every restaurant operator and every other business man operating a licensed public establishment, even on a segregated basis, has the right to call upon the police to protect him in such operation as against demonstrators, white or Negro, or both, who are deliberately locking their arms together, prostrating their bodies before the entrance to his es-

tablishment, and preventing his patrons from either entering or leaving his establishment. Particularly, is such restaurant operator justified in calling the police when such conduct has caused demonstrations over a period of five months, and causes large groups of citizens together about his place and violence ensues.

There was a period in English common law when certain persons were not within "the peace of the State," and it was no crime to kill them. Our present indictments still refer to the deceased as being within the "peace of the State." The writer does not believe that the United States Supreme Court has ever intended to rule that the operator of a restaurant, even a segregated restaurant, is not within the "peace of the State," which has been defined as follows:

> "The protection, security, and immunity from violence which the State undertakes to secure and extend to all persons within its jurisdiction, and entitled to the benefit of its laws." See *Black's Law Dictionary*, p. 1286.

This sacred right to the enjoyment of private property and its protection as against wrongdoers, must be balanced against the rights of all free people to demonstrate and exercise their freedom of speech. Even freedom of speech, however, has its limitations. In labor disputes secondary boycotts are outlawed and violations have resulted in many damage suits in favor of the employer.

It is a matter of deep concern to all thoughtful people that our country is now faced with many critical and devisive questions, such as labor unrest, racial unrest, and, most serious of all, a growing disrespect for law and or-

der. The most dangerous aspect of the latter problem is the spread of a spirit of lawlessness among the younger generation, even at the college level, and the curiosity to know the extent of that feeling prompted this Court on the trial of this habeas corpus petition to carefully question Tom Taylor Tolg, a teacher in sociology, twenty-three years of age, studying for a master's degree, as to his views. The following colloquy occurred: (parts are omitted)

Petitioner stated that he had been trying to appeal to the conscience of fellow Americans, and the Court asked him the following:

"Just tell me how it happened to be that you came down here to violate this law and make this test?"

Petitioner answered that he was in Atlanta where he "was in a demonstration with other students, where we very peaceably and non-violently had what is commonly known as a sit-in after being refused service, and then having a crowd surround us."

The Court: When you came here and accepted employment I assume that you realized that your employment was to be in the nature of doing the sit-in?"

Petitioner: "No sir, I wasn't quite sure what my employment would be, in that I did many other types of work also while I was in Atlanta that I did . . . that was completely legal."

The Court: "Well, you knew that that was part of the program of the Student Non-Violent Committee, did you not?"

Petitioner: "I knew that was a possibility. Yes sir."

The Court: "I assume that when you and your group were picketing outside this restaurant, it means that customers were not able to get in, and you did block the way, did you not, where customers could not come in and be served?"

Petitioner: "Yes sir."

The Court: "If you are operating a restaurant for profit and anyone prevents customers from coming in, it would eventually bankrupt you wouldn't it?"

Petitioner: "Yes sir."

The Court: "You don't call that force? Duress? Let's say duress?"

Petitioner: "This may be so, sir, although we also accepted force and duress."

The Court: "And you as a teacher of sociology do not think that you are taking the law in your own hands when you do that?"

Petitioner: "We are putting ourselves at the mercy of the law rather than taking the law into our own hands."

The Court: "As a student of sociology, do you not find there is a spirit of lawlessness increasing more and more in this country?"

Petitioner: "Yes."

The Court: "Do you not think that if young people and students are encouraged to violate the law in order

to test it, really you are adding to that spirit of lawlessness in the next generation?"

Petitioner: "I think the people who have been in these sit-ins are probably the most lawful citizens we have. They care more about the individual rights of all citizens than many people who are law abiding, but don't have the spirit of the law at all."

The Court: "Well, do you feel that you have the constitutional right to get outside of a man's place of business and keep customers from coming in there?"

Petitioner: "I think I may, yes, in a way."

It is a fundamental rule of statutory construction that a statute will not be construed in a way which will render it unconstitutional if there is a construction which would render it valid. The Georgia Supreme Court in the case of *Clark vs. The State*, 135 S.E.2nd, 270, *supra*, ruled that the Georgia anti-trespass statute did not violate a person's rights under the due process or equal protection clauses, or the Fourteenth Amendment to the United States Constitution. No court has ever decided as far as the writer knows, that the application of this statute denies any constitutional right to persons under the facts as exist in the instant case. This petitioner admits that he and his group put their bodies at the entrance of "Leb's" restaurant, that customers were not able to come in and leave, thus blocking the entrance, and that such conduct "would eventually bankrupt" the proprietor. He maintained that he had the "constitutional right to get outside of a man's place of business and keep customers from coming in there." Any segregation practiced by "Leb's" restaurant was not induced in any way by the

City authorities, nor was it encouraged. No arrests have been made for some five months prior to the incident in question. As applied to the arrest and prosecution of demonstrators for unlawful overt acts, disrupting a business, the statute would seem to be valid — and that is the question here presented.

A decision by the courts approving the methods pursued by petitioner and his associates in the instant case would clearly deprive the American business man of his right to do business, and it is clear that Mr. Tolg and the organization to which he belongs claim the right to disrupt business and bankrupt any restaurant establishment which practices segregation, and to do that by means other than by legally exercising their right of free speech.

The gravity of the situation facing this nation should such tactics be given the approval of the courts, is not only evidenced by sit-ins and violent demonstrations throughout the country, but by public declaration recently made by a responsible official of the Students Non-Violent Cooperation Committee that these practices would be increased in the future and the coming summer would be "a summer of discontent." All persons charged with enforcing the law and putting the brakes on an apparent movement toward lawlessness are therefore faced with a grave responsibility. Serious consideration should be given to the predicament of the American business man if, when faced by acts of lawlessness, he cannot turn to the police and to the courts for protection. Certainly there is a middle ground on which the law can tread without trampling underfoot the right of equal protection on the one hand, and the right to protection on the other.

This Court being of the opinion that petitioner's conviction and present detention are lawful, a Judgment denying his application for habeas corpus will be entered.

This the 8th day of May, 1964.

FRANK A. HOOPER
UNITED STATES DISTRICT JUDGE.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION.

THE UNITED STATES OF AMERICA, Ex Rel	:	CIVIL ACTION
vs.	:	
T. RALPH GRIMES, Sheriff of Fulton County, Georgia.	:	No. 8895.

JUDGMENT OF THE COURT.

Based upon Findings of Fact and Conclusions of Law contained in the Opinion this day entered in the above stated case,

IT IS ORDERED AND ADJUDGED that the prayers of plaintiff's petition for the writ of habeas corpus be and they are hereby OVERRULED AND DENIED. The petitioner is remanded to the custody of the respondent.

This the 8th day of May, 1964.

FRANK A. HOOPER
UNITED STATES DISTRICT JUDGE.

APPENDIX B

OPINION AND JUDGMENT OF THE COURT OF APPEALS

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21661

TOM TAYLOR TOLG,
Appellant-Appelle,

versus

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,
Appellee-Appellant.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Northern District of Georgia.

(January 24, 1966.)

Before TUTTLE, Chief Judge, BELL and COLEMAN, Circuit Judges.

TUTTLE, Chief Judge: This appeal presents the question whether the passage of the Civil Rights Act of 1964, given the retroactive effect that was given it by *Hamm v. City of Rock Hill, South Carolina*, 1964, 379 U.S. 306, re-

quired the invalidation by a Federal Court on petition for habeas corpus of a State Court conviction under an anti-trespass statute, invoked by a proprietor for the purpose of preventing access to his restaurant by persons on account of race.

The appeal is from an order denying the petition of appellant for a writ of habeas corpus. *U. S. ex rel Tolg v. Grimes,* (No. Dist. of Ga.) 1964, 229 F. Supp. 289. The order was entered prior to the passage of the Civil Rights Act of 1964. However, in denying the writ, the District Court granted appellant a certificate of probable cause and admitted him to bail pending this appeal.

Appellant, who at the time of his arrest, was a 23 year old white graduate teaching assistant at Miami University, Oxford, Ohio, was arrested at Leb's Restaurant in Atlanta, Georgia, when he and thirteen other persons, including eleven Negroes, attempted to enter for lunch. He was one of the same group of persons whose activities resulted in the removal of state prosecutions to the Federal Court and which was discussed by us in *Rachel v. State of Georgia,* 5 Cir., 342 F.2d 336, cert. granted October 11, 1965. Appellant was indicted and tried upon the charge that he had violated Section 26-3005 of the Georgia Code (Ann. Supp.), Georgia Laws 1960, p. 142.[1]

In every way open to him, Tolg attacked the constitutionality of the Georgia Statute, both on its face, and as

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[1] Ga. Code § 26-3005:

"It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Ga. Laws 1960, p. 142)."

applied to him and to persons of the Negro race with whom he was participating at the time of his arrest. He contended, that when applied to places of public accommodation, against persons who were denied access on account of race, the act of arrest and prosecution by the state authorities constituted a deprivation by the State of his rights under the Fourteenth Amendment to the Constitution. In making this contention he asserted a ground of relief which the United States Supreme Court pretermitted in arriving at its decision in *Bell v. Maryland*, 378 U.S. 226, but which was fully expounded and urged on the Court by three members.[2] It was a doctrine that was equally firmly repudiated by three other members of the Court.[3]

Appellant was convicted by a jury and sentenced by the trial court to serve twelve months of labor on the county public works and to serve six months in jail and to pay a fine of $1000.00. The sentence provided that if, after serving four months, appellant should certify to his intention to obey all of the laws of Georgia and of every other state wherein he might be a resident, the Court would reduce the sentence to the four months served.

Upon conviction and sentencing, Tolg filed a motion in arrest of judgment and a motion for a new trial, by which he again attacked the constitutionality of the statute as applied to him. He was released on bond in the amount of $5,000.00. In due time the motions were overruled, thus commencing a period of thirty days which, under the Georgia statute, was the time in which

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[2] See concurring opinion of Mr. Justice Goldberg joined by the Chief Justice and Mr. Justice Douglas. 378 U.S. 226, 286.

[3] See dissenting opinion by Mr. Justice Black, joined by Justices Harland and White.

a bill of exceptions could be filed. It is not clear from the record the exact cause for the failure of counsel to file their bill of exceptions within the thirty day period, but it is clear that, as found by the trial court in the habeas corpus proceeding, such failure was not due to any wilful intent to bypass the appellate procedures in the State of Georgia. See *Fay v. Noia*, 372 U. S. 391. Apparently counsel relied upon receiving a copy of the written order of the trial court which the judge's secretary, according to her best recollection, testified she had mailed but which, it was testified by counsel, they had not received. In any event, under the Georgia statutes this failure foreclosed any right of appeal to Georgia appellate courts.

On April 20, 1964, Tolg was committed to the custody of the Sheriff and he promptly filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia, contending that he was being held in violation of his federally protected constitutional rights.

Appellant did not file a petition for habeas corpus in the state courts prior to the filing of his application in the United States District Court.

The appellee, the Sheriff of Fulton County, Georgia, in his response, took issue on the merits of appellant's contention touching on his asserted constitutional rights, and moved to dismiss the petition on the ground that appellant had not exhausted his state remedies before filing the petition in the United States court, as required

by Title 28, Section 2254, U.S.C.A.[4] The trial court overruled the motion to dismiss, finding that "the unusual circumstances of this case, including the present confinement of the petitioner by the respondent, constitutes such unusual circumstances as to authorize this Court to entertain the writ."

On the merits of the petition, the trial court found that the State statute was neither unconstitutional on its face nor in its application in the case of a restaurant owner who desired to maintain a racially segregated clientele. Nevertheless, the Court issued its certificate of probable cause and continued the appellant at large under $5,000 bond pending this appeal.

While the case has been pending in this Court, two occurrences of great significance have changed the picture as it was presented to the trial court at the time of the hearing. The first of these was the enactment into law by the United States Congress of the Civil Rights Act of 1964, 78 Stat. 241. The second is the decision of the United States Supreme Court in the case of *Hamm v. City of Rock Hill, South Carolina,* 379 U.S. 306, decided December 14, 1964. Stated briefly, Section 201 of the Civil Rights Act defines a restaurant such as was here

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[4] Title 28, § 2254, U.S.C.A. — State custody; remedies in State Courts.

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

in issue as a place of "public accommodation within the meaning of this Title if its operation affects commerce."[5]

Section 203 of the Act prohibits any person from denying any person the right to patronize such a public accommodation.[6] It also provides that "No person, . . . shall punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 . . . ."

In cases which were before it on appeal from State courts, the Supreme Court decided in *Hamm v. Rock Hill, supra,* that "the [Civil Rights] Act intervened before either of the judgments under attack was finalized . . . abatement must follow in these state prosecutions." The Court further said, "Rather than a retroactive intrusion into State criminal law, this is but the application of a long standing federal rule, namely, that since the Civil Rights Act substitutes a right for a crime any state statute, or its application to the contrary must by virtue of the supremacy clause give way under the normal abatement rule covering pending convictions arising out of a pre-enactment activity. The great purpose of the Civil Rights legislation as to obliterate the effect of a distressing chapter of our history. This demands no less than the application of a normal rule of statutory construction to strike down pending convictions inconsistent with the purposes of the Act." 379 U.S. 306, 315.

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[5] It is not contended here by the State that Leb's Restaurant, a large downtown restaurant in Atlanta, is not such "public accommodation."

[6] Section 203 provides:
"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce any persons with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

Thus, in addition to the original ground for attacking the conviction in the state court, appellant now urges the passage of the Federal Statute as giving him an even clearer right to relief. Relying on the fact that Tolg's sentence of imprisonment and fine have not been completed, (in point of fact it had just started at the time of the filing of this petition) the thrust of the appellant's new argument now is that the Supreme Court gave retroactive effect to the Civil Rights Act in the *Hamm* case because of a constitutional principle; that any further punishment for pre-enactment violations of state anti-trespass laws would be a violation of his constitutional rights as well as a violation of the precise terms of the statute itself. In support of this position the following language from the Supreme Court's opinion in the *Hamm* case is apposite:

> "Far from finding a bar to the application of the rule where a state statute is involved, we find that our construction of the effect of the Civil Rights Act is more than statutory. It is required by the Supremacy Clause of the Constitution. See Kesler v. Department of Safety, 369 U.S. 153, 172 (1962); Hill v. Florida, 325 U.S. 538 (1945). Future state prosecutions under the Act being unconstitutional and there being no saving clause in the Act itself, convictions for pre-enactment violations would be equally unconstitutional and abatement necessarily follows."

Although the trial court found the exceptional circumstances to exist that it considered "render[ed] [state corrective] process ineffective to protect the rights of the prisoner," and thus concluded that it had jurisdiction to consider the application for writ without requiring any further proceedings in the state court, a finding within

the discretion of the trial court, which is entitled to great weight here, perhaps, we should deal, in limine, with the matter of exhaustion of state remedies. This we do because as already noted, Tolg filed no petition for writ of habeas corpus in the State Court, but proceeded directly in the Federal Court when it was apparent that he could no longer proceed by direct appeal in the courts of the state of Georgia by reason of the procedural situation then existing.

Unquestionably one of the circumstances which the trial court must have considered relevant in its decision to retain jurisdiction of the habeas corpus proceedings, was the fact that the Georgia courts have historically and consistently given a narrow application to the State statute authorizing the issuance of the writ of habeas corpus. See *Whippler v. Balkcom,* 5 Cir., 342 F.2d 388. We think it clear beyond doubt that the Georgia courts would hold that any question raised by this appellant in the trial court and which could have been perfected and passed upon by the State appellate courts, but which was foreclosed by the failure to file a timely appeal, cannot now be raised by habeas corpus in the state of Georgia. Particularly is it true that as we stated in *Cobb v. Balkcom,* 5 Cir., 339 F.2d 95, "In any event it follows that we cannot say at this point in the Georgia law that there is a presently existing State remedy available to the appellant" for the raising of the Fourteenth Amendment argument which he presented to the trial court and now urges here. Thus it is, that at the time the habeas corpus petition was filed in the District Court for the Northern District of Georgia, that Court was the only tribunal available to him in which he had a right to be heard on the issues then raised.

As it turns out, appellant's rights on the merits of his petition have been greatly enhanced during the pendency of this appeal.

The passage of the Civil Rights Act, and the decision of the Supreme Court in the *Hamm* case present him with an argument on appeal of entirely different dimensions than that presented by him to the State court on his motion in arrest of judgment and to the United States Court on his petition for habeas corpus. It should be noted that Tolg's argument that the Federal statute and the United States Constitution now deprive the State of Georgia of the right to punish him for a pre-enactment charge, may be of such a nature as would justify the hope that the Georgia courts might entertain a petition for habeas corpus to inquire into the legality of his detention, *if the suit were to be filed now* rather than before the passage of the Civil Rights Act. However, this is far from certain, especially in view of the failure of the appellant to preserve his rights of appeal, which failure may be treated by the Georgia appellate courts as a waiver of such right of appeal, and thus a "finalizing" of his conviction. However that may be, such right to invoke a state remedy even at this time would be partial at most because appellant could not raise the question of his original Fourteenth Amendment rights in the State court. He could raise only the claim that has been validated for him pending the appeal to this Court. We do not consider this an appropriate basis for overruling the District Court's determination that it had jurisdiction in the peculiar circumstances of the case.

But more important than this is the fact that the State, on behalf of the Fulton County Sheriff, frankly concedes the correctness of Tolg's contention that the case should

be disposed of on the merits here and now. In its brief the State says:

> "While the Appellee does not concede that the district court was correct in overruling his Motion to Dismiss, he does not insist upon his own exception. We feel that the question presented by the appeal is of vast importance; that the questions ultimately involve federal questions for determination by the federal system; and that *nothing would be gained by consuming the time and energy of counsel and the court by procedural shadow-boxing.* Therefore, the Appellee does not now insist upon his Motion to Dismiss. (Emphasis added)"

It being clear that the principle of exhaustion of state remedies is a matter of comity, not a matter of jurisdiction, *Whippler v. Balkcom*, 342 F.2d 388, 390, we think it is entirely permissible for the State to waive the failure to exhaust State remedies if it recognizes, as it apparently does in its presentation to this Court, that substantial justice will be furthered by such waiver. Moreover, it is clear that in oral argument before us the State recognized the great uncertainty of the availability of a State remedy in the posture in which the present case would stand were we to remand it to the District Court to withhold action pending the commencement of proceedings in a State court. The State does not here request that we stand aside to present to the Supreme Court of Georgia a further opportunity to expand its concept of habeas corpus jurisdiction as it did in the case of *Cobb v. Balkcom, supra,* which this Court expressly declined to do. See 339 F.2d at 100.

Finally, on the point of exhaustion of state remedies, we make the further observation. It is clear that the

only Court that had jurisdiction to grant the relief on the basis of the Fourteenth Amendment rights at the time the petition for habeas corpus was filed with the United States District Court. It concluded that it had jurisdiction and that the rules of comity did not forbid it to exercise the jurisdiction which it had. Now, at this date, more than eighteen months later, it appears that additional grounds for relief may have accrued to the petitioner, which, had they been available at the time the petition was filed in the District Court, may have warranted the belief that the State habeas corpus court would assume jurisdiction and decide the merits of the claim under these new grounds. We think the right of the petitioner to proceed in the Federal Courts must be measured as of the time his petition was filed and not as of the time the appeal is determined here. Especially must this be so when, as is true in this case, State court habeas corpus could *even now,* if available, be used for reaching only a part of the present grounds of attack of appellant's detention by the State authority.

We turn now to the merits of the appeal. The principal question here is whether, following a conviction under the Georgia anti-trespass statute, assumed to be valid at the time of the trial and sentence, the subsequent enactment by Congress of the Civil Rights Act invalidating the application of the anti-trespass statute in the circumstances here present, and the later ruling by the United States Supreme Court that the passage of the Civil Rights Act, by reason of retroactive application, invalidates all "pending convictions", requires the release of such convicted person from State custody.

The second question, i.e., whether there was merit in the original contention made by appellant that the ap-

plication of the Georgia anti-trespass statute in the circumstances of this case violated his Fourteenth Amendment rights, will not be reached because of the disposition we make of the case on the point first mentioned. Traditionally, of course, courts do not consider the question of the constitutionality of an Act where the result contended for can properly be reached by an interpretation of a statute. See *Hamm v. Rock Hill,* 379 U.S. 306, 316.

In the *Hamm* case, the Supreme Court abated convictions arising in South Carolina and in Arkansas for state trespasses occurring before the adoption of the statute, and which resulted in convictions and sentences imposed by the State courts prior to enactment of the Civil Rights Act. In doing so, the Court held that the State convictions, even though occurring prior to the enactment of the Federal statute, were "unconstitutional." The Court said:

> "Future state prosecutions under the Act being unconstitutional, and there being no saving clause in the Act itself, *convictions for pre-enactment violations would be equally unconstitutional* and abatement necessarily follows. (Emphasis added)"

It being clear that a *conviction* which is "unconstitutional" is ordinarily void and of no legal effect,[7] then it follows as a matter of course that such conviction may be attacked by habeas corpus even though the *case* may not still be "pending" in the ordinary sense of the term. It is usually a conviction which has become "final" that is the subject of attack in the habeas corpus court. The

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[7] The grounds of unconstitutionality are not denial of procedural due process "that has no bearing on guilt" such as was found in Linkletter v. Walker, 381 U.S. 618, not to warrant retrospective application. The ground here is want of authority to try and convict the accused.

classic example of the recognized basis of such an attack is that the conviction was unconstitutional.

Further language of the Supreme Court in the *Hamm* case is of significance:

> ". . . Since the provisions of the Act would abate all federal prosecutions it follows that the same rule must prevail under the Supremacy Clause which requires that a contrary state practice or state statute must give way. Here the Act intervened before either of the judgments under attack was finalized. Just as in federal cases abatement must follow in these state prosecutions. Rather than a retroactive intrusion into state criminal law this is but the application of a longstanding federal rule, namely, that since the Civil Rights Act substitutes a right for a crime any state statute, or its application, to the contrary must by virtue of the Supremacy Clause give way under the normal abatement rule covering pending convictions arising out of a pre-enactment activity. The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our history. This demands no less than the application of a normal rule of statutory construction to strike down pending convictions inconsistent with the purposes of the Act."

This language appears to be about as broad as could be used by the Court to indicate that any conviction which, if obtained in a state court following the Civil Rights Act would be invalidated by the federal statute, must be abrogated and voided completely, whether or not the *case* is still pending, if the *conviction* is still pending. This is still a "pending conviction," since the sentence resulting from it has not been served. We think the en-

tire scope of the opinion in *Hamm v. Rock Hill* requires that this conviction be held to be void and of no effect.

Moreover, even if the Supreme Court had not considered such convictions as being "unconstitutional" we conclude that the statute itself, on its face, requires that to the extent that the sentence meted out to Tolg has no been served it must be abated.

In the case of *Dilworth v. Riner*, 5 Cir., 343 F. 2d 226, this Court said: "The right to public accommodations on a non-discriminatory basis is a federal right the claim to which, Congress has said, shall not be the subject matter of punishment . . . [appellants] may simply not be punished." 343 F. 2d 226, 231. Thus it appears that Congress intended, as such intent was found by the Supreme Court in *Hamm*, not only that all prosecutions as to which there was still procedural steps to be taken should be abated, but that also all punishment should be abated where the cases were not "finalized" or where the *convictions* were pending or where, regardless of procedural terminology, punishment was still being meted out. This follows from the language of the statute that says, "No person shall . . . punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202." Under the Supremacy Clause of the Constitution this overrides any otherwise legal effort by a state to punish appellant Tolg for exercising his right to seek service at Leb's Restaurant and his refusal to leave when requested by the owner, the offense for which he was convicted under the state law.

As determined by the Supreme Court in the *Hamm* case, "The great purpose of the Civil Rights Legislation was to obliterate the effect of a distressing chapter of

our history." The prosecution which resulted in conviction of the appellant here was inconsistent with the purposes of the Act. We are required under the *Hamm* decision to remove this inconsistency. The Supreme Court has stated the manner in which this must be done: "This demands no less than the application of a normal rule of statutory construction to strike down pending convictions inconsistent with the purposes of the Act." 379 U.S. 315. This being a pending conviction, it thus becomes our duty to hold it void and to require that the District Court grant the writ and order the release of the appellant under this indictment.

The judgment is REVERSED and the case is REMANDED to the District Court for further proceedings not inconsistent with this opinion.

BELL, Circuit Judge, dissenting:

I respectfully dissent. Future historians concerned with the demise of our system of federalism may well consider this decision a significant step in that loss. It is an even sharper departure from that system than was the federal retention of jurisdiction in *Rachel v. State of Georgia,* 5 Cir., 1965, 342 F.2d 336, cert. granted, October 11, 1965, 34 L.W. 3101. All that is involved here is a state case not yet considered by the state courts although an available remedy there awaits appellant. No state relief whatever has been sought. The Georgia courts are not only deprived of the comity privilege to pass on appellant's claim but the decision is in the face of an express congressional interdiction that such relief as the majority has granted ". . . shall not be granted . . ." because there has been no exhaustion of a presently available state court remedy. 28 USCA, § 2254; and see *Fay v. Noia,* 1963, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837.

The *ratio decidendi* of the majority appears to rest mainly on dire circumstances rather than law but appellant would suffer no loss of liberty while the state court had his claim under consideration. Thus the decision is not only without warrant in law; it is also unnecessary. Appellant has double protection of his right to bail. He is at liberty on bail by order of the federal district court. The Georgia Supreme Court is also careful to preserve the right to bail. For example, state habeas corpus was the procedural vehicle used to gain admission to bail in another civil rights case arising out of the state trial court where this case had its genesis. *Jones v. Grimes, Sheriff*, 1964, 219 Ga. 585, 134 S.E.2d 790. Moreover, the district court at our direction could continue appellant on bail while he seeks relief in the state court system.

By way of summation, my view is that Georgia has a court system wherein the constitutional right asserted be appellant may be vindicated and her courts should not be avoided or placed in limbo on an *ad hoc* basis.

The circuitous reasoning by which the majority finds power and by which it disregards any semblance of comity is, I think, invalid. It goes like this. There was no available state remedy at the time the petition for habeas corpus was filed in the district court; thus the district court had jurisdiction. Although the district court denied the petition on the grounds that it was without merit, the supervention of the Civil Rights Act of 1964 and the case of *Hamm v. City of Rock Hill*, 1964, 379 U.S. 306, 85 S.Ct. 384, 13 L.Ed.2d 300, appear to have infused merit into appellant's case while it was on appeal. Even if the infused principle was available to appellant in the state courts, nevertheless, the federal district court and now this court

has jurisdiction because of the non-meritorious claim asserted in the district court. This reasoning avoids the fact that the basis and the only basis of the relief now afforded appellant by the majority is the supervening Civil Rights Act and the *Hamm* case, *supra;* relief that may be obtained in the first instance in the state courts.

The opinion of the majority also hinges on the waiver by the Attorney General of Georgia of any right the state courts may have to adjudicate the questions asserted by appellant and apparently, of any restriction this court may have on its power by 28 USCA, § 2254, *supra. Cf. Warren v. Conner,* No. 21,853, now pending in this court, where there is no waiver in a case involving the same question but which was tried in a different state court. This cavalier approach by the office of the Attorney General of Georgia is a new concept in the division of jurisdiction between federal and state courts under the doctrine of comity. It is also a novel expansion of the federal statute governing the power of federal courts to grant habeas corpus to state prisoners. § 2254, *supra.*

Now the lawyers will decide which court may act. I do not see how we can manage the dual system of courts — federal and state — which are inherent in our federalism on any such basis. Comity, as I understand it, is a form of court self-discipline designed to limit intrusion by the courts of one of the systems into the affairs of courts of the other, and it alone should carry the day here. However, Congress, perhaps unwilling to rely on the exercise of self-discipline by federal courts in the habeas corpus area because of the balance that is drawn in such cases between state and federal laws as well as state and federal courts, and because problems arising from the maintenance of local order are involved, has expressly proscribed

the power of federal courts. See § 2254, *supra*, footnote 4 to majority opinion, together with the gloss of *Fay v. Noia, supra.* As noted, this statute speaks in terms of ". . . shall not grant . . ." and it contains no provision whereby counsel or a party may invest the court with authority to grant the writ. This concept of waiver, now that it has received the imprimatur of the court, is freighted with the seeds for creating grave uncertainty in the state judicial process, and ultimately, to severely impair the state court system as it applies to criminal justice.

Our approach should be to first determine whether there is a state procedural remedy presently available to appellant to claim his right under the Civil Rights Act of 1964, as given retroactive application in *Hamm v. City of Rock Hill,* 1964, 379 U.S. 306, 85 S.Ct. 384, 13 L.Ed.2d 300, not to be further punished. This right springs only from the supervention of the Act, and the *Hamm* case, after the state court trial and after the district court decision denying the relief sought. This is the basis which the majority finds for granting the relief. *Cf. Dilworth v. Riner,* 5 Cir., 1965, 343 F.2d 226. The question then is which court, federal or state, should now afford appellant relief on this basis. The Georgia Supreme Court has already given effect in cases on direct appeal to *Hamm* and the Civil Rights Act of 1964. *Bolton v. State of Georgia,* 1965, 220 Ga. 632, 140 S.E.2d 866. May rights arising thereunder also be claimed in the Georgia courts by way of habeas corpus?

In this connection, and preliminarily, we turn our attention to the question of whether appellant may avail himself of the remedy of state habeas corpus and continue at liberty on bond. The Georgia Supreme Court has answered this question in the affirmative. A Georgia

court will hear and decide a petition for habeas corpus on its merits even when the applicant for habeas corpus may have been improperly admitted to bond. *Sanders v. McHan,* 1949, 206 Ga. 155, 56 S.E.2d 281. See also *Soviero v. The State,* 1964, 220 Ga. 119, 137 S.E.2d 471. Here appellant, having been admitted to bond by the District Court, is not presently incarcerated but he is in the constructive custody of the sheriff of Fulton County, Georgia.

And as we recently stated, the current law of exhaustion is that an applicant for the writ must exhaust his state remedies before applying for federal habeas corpus unless the state remedy is foreclosed, or is so ineffective or inadequate or uncertain as to amount to an absence of state remedy. *Whippler v. Balkcom,* 5 Cir., 1965, 342 F.2d 388; *Smart v. Balkcom,* 5 Cir., 1965, 352 F.2d 502. Proceeding then to the state remedy question, we are aware of the narrowness of the scope of habeas corpus in Georgia. *Cobb v. Balkcom,* 5 Cir., 1964, 339 F.2d 95; *Whippler v. Balkcom, supra; Smart v. Balkcom, supra.* It is available when the trial court was without jurisdiction or where it exceeded its jurisdiction in making the order, rendering judgment or passing sentence to the extent that the order, judgment or sentence is void. Deprivation of counsel is treated as rendering the judgment void. See *Whippler* and *Smart, supra.* A sentence which exceeds the jurisdiction of the court is void. See *Smart, supra,* and *Balkcom v. Defore,* 1964, 219 Ga. 641, 135 S.E.2d 425. But the question before us, and which should be before the Georgia courts on remand from the fact that the state remedy was not exhausted, does not fall within the scope of the jurisdiction of the trial court. It takes the nature of illegal detention or restraint.

This stems from the fact that § 203(c) of Title II of the Civil Rights Act of 1964 provides that "no person

shall . . . punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by § 201 . . .". §§ 201, of course, is the equal enjoyment of public accommodations section. *Cf. Dilworth v. Riner, supra.* A situation where a prisoner contends that he has executed the sentence imposed and is being illegally detained is analogous. The remedy of habeas corpus is clearly available in Georgia in such a situation. See *Gable v. Reese,* 1959, 214 Ga. 697, 107 S.E. 175. There the court was satisfied to rely for jurisdiction on the Georgia statute governing who may "sue out" a writ of habeas corpus:

> "Any person restrained of his liberty under any pretext whatever . . . may sue out a writ of habeas corpus to inquire into the legality of such restraint." Ga. Code § 50-101.

Also somewhat analogous are cases involving the use of habeas corpus to determine the legality of the restraint of a person incarcerated for allegedly breaching a condition of a pardon. See *Pippin v. Johnson,* 1941, 192 Ga. 450, 15 S.E.2d 712, *Pappas v. Aldredge,* 1941, 192 Ga. 482, 15 S.E.2d 718. In the second of these cases, *Pappas* was convicted on a charge of operating a lottery and sentenced to imprisonment. While his conviction was pending on review and he was at liberty under a supersedeas bond, he procured a pardon and dismissed his appeal. The pardon was conditioned upon his paying a fine of $50.00 and obeying all of the laws of Georgia, or of any other state and of the United States. The pardon reserved in the governor the right to revoke the same at his pleasure. Having failed to pay the $50.00 fine, the sentencing court issued a rule on the question of whether his supersedeas bond should be forfeited. He failed to appear and

his bond was forfeited. He then tendered the $50.00 fine to the sheriff who refused the tender. He was taken into custody and brought a habeas corpus proceeding against the sheriff. His contention on the habeas hearing was that he turned the money over to his attorney with which to pay the fine, and that the attorney failed to pay it. On the testimony of the attorney that this was not so, the trial court entered judgment remanding Pappas to the custody of the sheriff. This judgment was affirmed on appeal, but the case, as does the *Pippin* case, stands for the proposition that the legality of detention or restraint may be tested by a petition for a writ of habeas corpus. Thus Georgia has a presently available remedy for appellant and it should be utilized.

Elan may have its place in some areas of life; it is hardly a basis for maintaining the delicate dual court aspect of federalism. It is not compatible with stability in the law; something devoutly to be desired in a country dedicated to ordered liberty.

COLEMAN, Circuit Judge (concurring):

I cannot see that this decision presents any threat to our system of federalism. On the contrary, we have accepted, honored, and acted upon the stipulation of the State. We have disposed of this case in keeping with the mandates of the Congress and of the Supreme Court. We have refrained from the "procedural shadow boxing" so aptly referred to by the State Attorney General. I therefor concur completely in the foregoing opinion.

CERTIFICATE OF SERVICE

I, ALFRED L. EVANS, JR., Assistant Attorney General of the State of Georgia, do certify that I have this day served copies of the within and foregoing Petition for a Writ of Certiorari, prior to filing the same, upon Respondent, by depositing a copy thereof, postage prepaid, in the United States Mail, first class, properly addressed to Respondent's counsel of record:

Howard Moore, Jr., Esq.
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and depositing a copy also in the United States Mail, airmail, postage prepaid and properly addressed to Respondent's counsel of record:

Jack Greenberg, Esq. and
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New York 19, New York

This day of April, 1966.

ALFRED L. EVANS, JR.
of Counsel for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1246

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,

Petitioner,

—v.—

TOM TAYLOR TOLG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Statement of the Case

Petitioner's statement of facts is incomplete and contradicted by the record. Respondent, therefore, submits the following corrections and additions.

On June 17, 1963, respondent Tom Taylor Tolg, a 23-year old white graduate assistant at Miami University, Oxford, Ohio, was arrested at Leb's Restaurant in Atlanta, Georgia when he and 13 others, including 11 Negroes, attempted to enter for lunch (Tr.* 4, 53).

Uncontroverted testimony shows that Tolg and his companions were clean, quiet and sober; at no time were they

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* Tr. refers to the brief of evidence upon the trial of the case in the Superior Court, Fulton County, Georgia, filed May 11, 1964.

boisterous or unruly (PA** 87). Nevertheless, when they approached the foyer of the restaurant the employees of the restaurant, stationed outside the entrance, attacked the group as it entered the foyer and the owner held the door against their entry (PA 72, Tr. 2, 3, 18, 19). A crowd quickly formed around respondent Tolg and his companions, and they were further beaten, kicked and punched (Tr. 11, 13, 30, 75, 76; R. 66-68). Two of Tolg's companions subsequently received hospital treatment for lacerations (PA 79, Tr. 62).

At no time did Tolg or his companions assault anyone, and at no time did they physically defend themselves. Instead, they locked arms to protect themselves against further injuries and to avoid responding with violence (Tr. 35, 86, PA 94, 104; R. 56, 68). The assault on them continued, however, until Lt. Perry of the Atlanta Police Department arrived and ordered the "rough stuff" terminated (PA 82).

It is uncontroverted that within 12 minutes of his arrival, Lt. Perry arrested Tolg and his companions and carried them to the parked police wagons (PA 60). One member of the group explained why it was necessary to carry him away:

> I felt unable to leave the restaurant because of two facts already described. One, I was very shaken up by the beating and, two, there was a very hostile crowd there which, I felt that in all consideration of my personal property, which includes myself, that it was safer to remain on the premises rather than walk into a crowd (PA 98).

** PA refers to the transcript of evidence taken on the Plea of Abatement in the Superior Court, Fulton County, Georgia, filed May 11, 1964.

The police did not arrest any of the people who attacked the students (Tr. 63).

After being convicted and sentenced, Tolg filed motions in arrest of judgment and for a new trial (R. 141-142). At a hearing on February 11, 1964, the parties agreed that the court would not rule on the motions until the transcript of the plea in abatement had been completed and approved by the court (R. 144-146). Judge Durwood T. Pye had 90 days from the presentment of the transcript of evidence on the plea of abatement to rule on the motions. On March 11, 1964 the completed transcript was delivered to Tolg's counsel. The court approved the transcript on March 12, 1964 and overruled the motions on March 13, 1964 (R. 141-143, 147).

Tolg's attorney testified that he never was notified that the motions had been overruled. He learned of the court's action when he encountered Judge Pye in court on April 17, 1964 and questioned him about the motions. By that time, the time for filing a bill of exceptions had expired. Mrs. Lorraine Johnson, secretary to Judge Pye, testified that she mailed a copy of the orders to Tolg's attorneys on March 13, 1964 (R. 16, 18, 21). There was no record of the mailing and Mrs. Johnson admitted she was relying solely upon her recollection (R. 19-20).

Reasons for Denying the Writ

I.

The court below properly concluded that respondent's conduct was protected by 1964 Civil Rights Act.

Petitioner, by suggesting that Tolg's conduct was forcible and therefore not protected by the 1964 Civil Rights Act,[1] has deliberately misstated the basis of the District Court's decision and distorted the evidence reviewed by the Court of Appeals. The District Court did not find, as suggested by petitioner, that Tolg forcibly sought entry to Leb's Restaurant. Indeed, the court found only that Tolg and the others had restricted access to the restaurant (R. 154). The Court of Appeals had an uncontroverted record showing that Tolg and the others were orderly and that they acted only to protect themselves against assaults.

Petitioner's distortion of the evidence is exemplified by the comment that the decision below in effect protects conduct that "does not differ in kind" from "pull[ing] a pistol, shoot[ing] and kill[ing] the offending restaurant owner" (p. 8 Petition for Writ of Certiorari). Respondent submits, however, that the conduct here more closely resembles that reviewed in *McKinnie* v. *Tennessee,* 380 U.S. 449 (1965), where this Court reversed pre-enactment convictions against petitioners who similarly had been prevented from entering a restaurant. There, as here, crowding resulted from holding the door against the entry of the group seeking service.

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[1] *Hamm* v. *Rock Hill,* 379 U.S. 306, 311 (1965) voided pre-enactment convictions for *"nonforcible"* attempts to gain admittance or to remain in places of public accommodations. (Emphasis added.)

II.

Respondent has not stated any reasons justifying certiorari review.

Petitioner has urged this Court to review the Court of Appeal's application of the abatement principle of *Hamm* v. *Rock Hill,* 379 U.S. 306 (1964) to convictions on collateral review at the time of the passage of the 1964 Civil Rights Act. Significantly, petitioner offers no reasons justifying certiorari review and fails to mention that only two or three cases now pending would be affected by such a review. Nearly all pre-enactment convictions have been dismissed under the mandate of *Hamm,* and what was in that case a matter of great public importance has become insignificant.

Respondent respectfully submits that this case does not raise any of the considerations which normally motivate this Court to exercise certiorari jurisdiction. Not only is this case not of general public importance, it does not involve a conflict between Courts of Appeals, nor does it conflict with the decision of this Court in *Hamm* v. *Rock Hill,* 379 U.S. 306. In voiding respondent's pre-enactment conviction, the Court of Appeals for the Fifth Circuit merely applied the rule of law formulated in *Hamm* to the facts of the case before it.

CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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